Supreme Court, U.S.
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NO. 98-1161

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a/ KANDYLAND,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding. There are no parent companies or subsidiaries of respondent.

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The respondent, Pap's A.M., t/d/b/a Kandyland, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Pennsylvania's Opinion in this case. That Opinion is reported at 719 A.2d 273 (Pa. 1998).

STATEMENT OF THE CASE

On September 28, 1994 City Council of the City of Erie enacted Ordinance No. 75-1994 by a four-two vote. The Ordinance was signed into law by the mayor on September 30, 1994. The Ordinance provided criminal penalties for anyone appearing in a state of nudity in a public place. Public place was defined by the Ordinance to include any location "owned by or open to the general public." [1] The Ordinance excepted from the nudity prohibition any child under age 10 or a nursing mother exposing a breast so long as the breast feeding infant is under two years of age.[2]

On October 14, 1994 Pap's A.M. filed a complaint in equity with the Court of Common Pleas of Erie County, Pennsylvania. The Ordinance was challenged as being a violation of freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution, as being unconstitutionally overbroad, and as being a violation of the equal protection clauses of the

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[1] "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and all enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theatres, dance halls, banquets halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

[2] Article 711(4)

Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Pennsylvania Constitution. The Ordinance was also challenged as constituting a taking under the United States and Pennsylvania Constitutions and as being a violation of Pennsylvania Preemption laws.

On December 21, 1994 a hearing was held before the Court of Common Pleas of Erie County, Pennsylvania. The respondent was joined by two theatrical companies, the Erie Playhouse and the Roadhouse Theater, in challenging the Ordinance. Pap's A.M. presented videotaped city council proceedings in which each member of the majority stated that he was supporting the Ordinance for morality considerations.[3] The City produced no evidence.

The Erie Playhouse and Roadhouse Theatre noted that they had presented productions such as "*Hair*" and "*Equus*" which contained nudity as proscribed by the ordinance. The theatres expressed concern that their ability to present future productions in the city would be chilled.[4] The City recognized that enforcement would be subjective but assured the Court that nudity would be permitted in some productions at the discretion of the City.[5]

On June 18, 1995 the Court of Common Pleas issued an Opinion and Order holding the statute unconstitutionally overbroad in violation of both the United States and Pennsylvania Constitutions. The Court did not reach the other issues raised by Pap's A.M..

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[3] See ***Pap's A.M. v. City of Erie***, 674 A.2d 338, 343 n. 10 (Pa.Cmwlth. 1996).

[4] *Id.* at 345 n. 13

[5] The City did not prosecute the Roadhouse Theatre for showing a performance of *Equus* after the enactment of the Ordinance. ***Pap's A.M., supra,*** 674 A.2d at 346.

The City subsequently filed a Notice of Appeal to the Commonwealth Court of Pennsylvania on May 27, 1996. The Commonwealth Court reversed the Order of the Court of Common Pleas. ***Pap's A.M. v. City of Erie,*** 674 A.2d 338 (Pa. Cmwlth. 1996). The Commonwealth Court held that the Ordinance was in violation of neither the United States nor Pennsylvania Constitutions.

Pap's A.M. subsequently filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On January 28, 1997 the Supreme Court of Pennsylvania granted the Petition limited to two issues: "Whether the Erie City Ordinance is unconstitutionally overbroad and whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pa. Constitution." ***Pap's A.M. v. City of Erie,*** 688 A.2d 168, 169 (Pa. 1997).

On October 21, 1998 the Supreme Court of Pennsylvania issued an Opinion and Order unanimously holding the Ordinance to be an unconstitutional infringement of freedom of expression. ***Pap's A.M. v. City of Erie,*** 719 A.2d 273 (Pa. 1998). The majority held that the Ordinance was in derogation of the First and Fourteenth Amendments to the United States Constitution. The majority did not reach the state constitutional issue. ***Pap's A.M., supra,*** at 281 n. 12. The concurring justices held that the Ordinance did not violate the First and Fourteenth Amendments but held that that Ordinance was in violation of Article I, Section 7 of the Pennsylvania Constitution.

The Supreme Court of Pennsylvania began its analysis by noting that the "act of dancing nude, with its intended erotic message, is an expressive act entitled to First Amendment protection." ***Pap's A.M., supra,*** at 276 The

Court noted that eight of the nine members of this Court had supported this position in ***Barnes v. Glen Theatre, Inc.,*** 501 U.S. 560 (1991). The Court then conducted a detailed analysis of the multiple opinions authored in ***Barnes*** and concluded that no rationale had garnered majority support. ***Pap's A.M., supra,*** at 278. The Supreme Court of Pennsylvania therefore conducted an independent examination of the First and Fourteenth Amendments and concluded that "the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." ***Pap's A.M., supra,*** at 279. The Court stated that as the Ordinance's restrictions were content-based that a strict scrutiny analysis was required. The Court held that the Ordinance could not withstand strict scrutiny analysis and severed the offending provisions of the Ordinance, sections 1(c) and 2. The concurring justices joined the majority's strict scrutiny analysis but would have applied it on state constitutional rather than federal constitutional grounds.

REASONS WHY THE PETITION SHOULD BE DENIED

The City of Erie enacted the Ordinance at issue for the sole purpose of prohibiting nude dancing. The City candidly admitted that some public nudity would be permitted. In fact, the City allowed the public to view a production of *Equus* which contained full nudity after the enactment of the Ordinance.[6] The City further promised the mainstream theatres that additional productions involving nudity would be permitted at the discretion of the City government.

The City accuses the Supreme Court of Pennsylvania of "willfully" disregarding binding precedent in violation of the Supremacy Clause at Article VI, Clause 2 of the

[6] ***Pap's A.M., supra,*** 674 A.2d at 346.

Constitution. This issue does not warrant review by this Court. There can be no question but that decisions of this Court interpreting the United States Constitution are binding on every Court in the nation. ***Oregon v. Haas,*** 420 U.S. 714, 719 (1975). Willful defiance of Supreme Court precedent is not an issue subject to debate or worthy of review. It is simply not acceptable. ***Jaffree v. Board of School Commissioners,*** 554 F.Supp. 1104 (S.D.Ala.1983), order stayed, 459 U.S. 1314 (1983) (Powell, Circuit Justice).

The Supreme Court of Pennsylvania did not disregard binding precedent. The Court conducted a detailed and painstaking evaluation of the multiple opinions in ***Barnes*** pursuant to this Court's ruling in ***Marks v. United States,*** 430 U.S. 188, 194 (1977) (a fragmented Court's holding "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds…") The Pennsylvania Court discerned that a clear majority in ***Barnes*** agreed that "nude dancing is entitled to some First Amendment protection." ***Pap's A.M., supra,*** 719 A.2d at 278. The Court then analyzed the plurality and two concurring Opinions and concluded that no rationale commanded five votes. As the Court noted, the plurality Opinion authored by Chief Justice Rehnquist viewed the Indiana law as content-neutral because the law prohibited all public nudity. Chief Justice Rehnquist concluded that the law was constitutional in order to protect public morality. Justice Souter did not agree with Chief Justice Rehnquist's holding. Justice Souter utilized the secondary effects doctrine to conclude that the law was a content-neutral proscription against public nudity and nude dancing. Justice Scalia opined that nude dancing restrictions should not be analyzed pursuant to the First Amendment. The Pennsylvania Court therefore concluded that as there were not five votes for any one position that ***Barnes*** could not be considered as binding precedent.

The Supreme Court of Pennsylvania was obligated to review the Erie Ordinance and the evidentiary record. The Court held that the Erie Ordinance was content-based and that its purpose was "to impact negatively on the erotic message of the dance." ***Pap's A.M., supra,*** 719 A.2d at 279. In fact, the Erie Ordinance was explicitly enacted to target the type of nude dancing offered at Kandyland. The City repeatedly represented that other types of nude expression were acceptable such as the *Equus* production presented at the Roadhouse Theatre. The Pennsylvania Court viewed the Erie Ordinance as content-based as the only difference between nudity at Kandyland and nudity in *Equus* was the message conveyed by the dancer. As the Ordinance was clearly content-based the Supreme Court of Pennsylvania properly applied a strict scrutiny analysis.

Pap's A.M. recognizes that several lower courts have viewed Justice Souter's concurring opinion as binding precedent. ***Triplett Grille, Inc. v. City of Akron,*** 40 F.3d 129 (6th Cir. 1994); ***International Eateries of Am., Inc. v. Broward County,*** 941 F.2d 1157 (11th Cir. 1991). But ***cf. Nakatomi Investments, Inc. v. City of Schenectady,*** 949 F.Supp. 988 (N.D.N.Y. 1997). Even if one assumes that Justice Souter's concurring opinion is controlling the offending provisions of the Erie Ordinance must be stricken. The record reveals that the Ordinance was adopted for the protection of morality and not to combat alleged secondary effects. The City was not at all concerned about secondary effects. In fact, the City presented no evidence whatsoever that nude dancing caused any harmful effects. See ***Phillips v. Borough of Keyport,*** 107 F.3d 164, 175 (3rd Cir. 1997).

CONCLUSION

The Supreme Court of Pennsylvania did not willfully ignore ***Barnes***. The Court conducted a careful review of ***Barnes,*** applied it to the facts of this case and reached an

appropriate ruling. The City does not ask this Court to review ***Barnes.*** It suggests that the Supreme Court of Pennsylvania violated the Supremacy Clause. It is respectfully averred that even if one assumes *arguendo* that the Supreme Court of Pennsylvania misapplied ***Barnes*** that is not sufficient justification for granting *certiorari.* This case does not warrant review. The Petition should be denied.

Respectfully Submitted,

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